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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

JAMES ROBERT GROGAN, III, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 28, 1967.

CITATIONS TO OPINIONS BELOW

The original opinion of the Court of Appeals, printed in Appendix B hereto, is reported in 386 F.2d 300 (5th Cir. 1967). The opinion of the Court of Appeals on Motion for Reconsideration of Order Denying Original Petition for Rehearing is yet unreported and is printed in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1967 (R. 890) and rehearing was denied on

December 28, 1967 (S. R. 6). Motion for Leave to File Second Petition for Rehearing was filed January 4, 1968, and considering it as a Motion for Reconsideration of Original Order Denying Rehearing, was granted on February 6, 1968 (S. R. 7). Reconsideration was denied on April 2, 1968 (S. R. 94). Application for Extension of Time in Which to File Petition for Writ of Certiorari was granted April 19, 1968, extending the time to June 1, 1968 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether an accused can by silence waive his Constitutional protection against being twice placed in jeopardy.

2. Whether jeopardy attaches and bars a subsequent retrial when a trial judge, after a long and complicated trial, declares a mistrial on the ground that the jury cannot agree, but the jury have deliberated only three hours and thirty-five minutes and have never indicated that they are having difficulty agreeing, and the trial judge makes no inquiry of them concerning the status of their deliberations or the probability of agreement.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Constitutional provision involved is the double jeopardy clause of the Fifth Amendment to the Constitution of the United States printed in Appendix E. The Rule involved is R. 12(b) of the Federal Rules of Criminal Procedure, printed in Appendix E.

STATEMENT

On February 2, 1966, petitioner James Robert Grogan, III, together with two other defendants were indicted in two counts for violations of 18 U.S.C. 371 (conspiracy to steal government property) and 18 U.S.C. 641 (receiving stolen government property knowing it to have been stolen) (R. 2-4). Petitioner pled not guilty and was brought to trial on March 28, 1966, before the Honorable J. Robert Elliott, United States District Judge for the Middle District of Georgia, sitting with a jury. The trial of the three defendants, each charged in two counts, consumed four trial days consisting of 21-1/3 actual trial hours. The jury, which heard twenty-three witnesses and had before it over 100 exhibits, retired to deliberate upon its verdict at 5:15 P.M., Thursday, March 31 (R. 851). They deliberated for approximately one hour and fifteen minutes before recessing for supper, returning some hour and a half later. At 10 o'clock P.M., after only 3½ hours of actual deliberations and without any request for additional instructions from the jury, the trial judge recalled them and charged them as follows:

> "Mr. Hudson [foreman of jury], I gather that the jury has not yet been able to reach a verdict in this case . . . . .I presume that it is a question of fact that is bothering the jury . . . .
>
> "Now, you just be seated for a moment and let me give the jury a little further instruction, which may be or may not be of some help to you in the situation. * * * Since it is obvious that you have not reached a verdict with respect to all counts in the indictment with respect to all defendants, but since it is possible that you may have reached unanimous agreement with regard to both counts in connection with some defendant, some one or more defendants, I want to make it clear to you that at any time you reach unanimous

agreement on a verdict with regard to any defendant in this case, you may enter that verdict with regard to that defendant on the indictment and return that verdict into court, even though you may still be in disagreement with regard to the other defendants in the case.

"If you do that . . . then I will decide after you return that verdict what should be done, whether I should require you to deliberate further with regard to the defendant or defendants concerning whom you have not reached agreement, or whether I would simply declare a mistrial with regard to that defendant or those defendants concerning whom you have not reached unanimous agreement." (R. 851-4).

The jury retired and returned in less than ten minutes with a verdict of "not guilty" as to defendant Packard (an employee of petitioner). Without any comment on the part of the jurors or inquiry of them concerning the status of their deliberations as to the remaining defendants, the trial judge declared a mistrial in the following words:

"All right, the Court will declare a mistrial in connection with the cases of Grogan and Davis and the cases will be tried again at a subsequent date before another jury." (R. 857).

On September 6, 1966, petitioner was retried upon the same indictment before Judge Elliott sitting with a jury (R. 24-30). On September 12, 1966, he was found guilty on both counts (R. 799) and sentenced to two terms of five years each, to run concurrently (R. 798-800). On appeal, petitioner contended that jeopardy had attached when Judge Elliott discharged the jury in his first trial. The Court of Appeals for the Fifth Circuit, upon the authority of Federal Rules of Criminal Procedure 12 (b), *Barker v. Ohio*, 328 F.2d

582 (6th Cir. 1964), and *Ferina v. United States*, 340 F.2d 837 (8th Cir. 1965), held that "this defense . . . should have been affirmatively raised at some point in the proceedings in the district court and was thus waived by [petitioner's] failure to assert it at the trial." 386 F.2d at 301. Despite this holding, the Court also expressed its opinion as to the merits of petitioner's plea of former jeopardy, and, citing *United States v. Perez*, 9 Wheat. (22 US) 578, (1824), said in dictum that the trial court "did not abuse its discretion by declaring a mistrial . . . ." 386 F.2d at 302.

After petition for rehearing was denied, petitioner's trial counsel withdrew from the case (his principal counsel had died while the appeal was being prepared) and petitioner retained present counsel, who sought reconsideration of the Court's original opinion on appeal on the grounds that the Court had not previously had the benefit of numerous controlling decisions, including this Court's opinion in *Downum v. United States*, 372 U.S. 734 (1963). The Motion for Leave to File Petition for Reconsideration was granted and petitioner filed briefs in support of his contention that jeopardy attached when the jury was discharged under circumstances which made the mistrial not merely an abuse of discretion but a total failure to exercise discretion. The Court of Appeals disregarded petitioner's substantive arguments and, in a *per curiam* opinion filed April 2, 1968, (Appendix C) reaffirmed its original holding on waiver by silence and added:

> "The trial judge . . . saw quite clearly that the jury was unable to agree on a verdict."

Petitioner contends that, on the contrary, the trial judge made no effort to determine the status of the jury's deliberations and that no facts existed on which to base his conclusion that "the jury was unable to agree."

REASONS THE WRIT SHOULD BE GRANTED

1. The decisions of the court below in the instant case and of the Eighth Circuit in *Ferina v. United States*, 340 F.2d 837 (1965) and the Sixth Circuit in *Barker v. Ohio*, 328 F.2d 582 (1964), upon the authority of which the instant case was decided, directly conflict with the decision of the Ninth Circuit in *Himmelfarb v. United States*, 175 F.2d 924 (1949).

In *Himmelfarb*, the District Attorney made an improper reference to another case pending against the defendant, and Himmelfarb's attorney moved for a mistrial, which was granted. Himmelfarb was retried and convicted and, on appeal, raised the issue of former jeopardy on the grounds that the discharge of the first jury had been improper, even though it had been at the instance of Himmelfarb's attorney. The government contended that the attorney's motion constituted an express waiver of Himmelfarb's right to assert double jeopardy. The Ninth Circuit cited this Court's decision on waiver of Constitutional rights in *Glasser v. United States*, 315 U.S. 60, 67 (1941) and held that "no stipulation of counsel waiving his client's constitutional right could be effective without the client's specific assent." Even an attorney's motion for a mistrial cannot justify an otherwise improper discharge of a jury, because such a holding would be "to condone a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused." In the instant case, there was not even a motion for a mistrial, and the Fifth Circuit relies upon the failure of petitioner's trial counsel to object specifically to the mistrial and to raise this point expressly at the beginning of the second trial, citing as authority, in the latter instance, Federal Rules of Criminal Procedure 12(b). The Sixth and Eighth Circuit opinions cite no superior authority nor reasoning and rely solely upon Rule 12(b).

Rule 12(b), however, is not appropriate here, because the improper declaration of a mistrial operates as an acquittal, *Downum v. United States*, 372 U.S. 734 (1963), which divests the court of further jurisdiction; and that rule contains a specific exception for "defenses . . . based on defects [which] . . . show [a lack of] . . . jurisdiction in the court . . . ." These, the Rule commands, "*shall* be noticed by the court at any time . . . ." (Emphasis added.) Proceedings subsequent to an acquittal by reason of the attachment of jeopardy are *coram non judice* just as much as if the court had sought to impose a second penalty, *Ex parte Lange*, 85 U.S. 163 (1874), or if the defendant had been deprived of his right to counsel, *Johnson v. Zerbst*, 304 U.S. 458 (1938). It is difficult to imagine circumstances in which an accused would knowingly and intelligently waive an improperly declared mistrial since this would be tantamount to his discharge.

The doctrine of waiver by silence with reference to this particular constitutional right has recently been twice rejected by this Court. In *Green v. United States*, 355 U.S. 184 (1957), the government contended that the defendant's appeal of his conviction on the ground that it was not supported by the evidence, waived his right to assert former jeopardy with regard to a higher offense on which the jury had returned no verdict at the first trial. This court rejected the implied waiver theory, holding that

> "in any normal sense, . . . [waiver] connotes some kind of voluntary knowing relinquishment of a right." *Id.* at 191.

Again, in *Gori v. United States*, the defendant failed to raise his double jeopardy objection in the trial court and the Second Circuit's holding was based upon waiver by silence, 282 F.2d 43, 47 (1960). This Court, however, did not even feel the point worthy of consideration in its opinion, deciding the case on its merits, 367 U.S. 364 (1961).

These decisions are in accord with this Court's holdings regarding waiver of other fundamental rights. *Miranda v. Arizona*, 384 U.S. 436 (1966), *Johnson v. Zerbst*, 304 U.S. 458 (1938), *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966), R. 19. The Circuit Courts which rely upon the doctrine of waiver by silence demonstrate their uncertainty as to its validity when, after their holdings, they uniformly consider the cases on their merits. As *Himmelfarb* holds, the protection against double jeopardy is so fundamental that no action on the part of counsel can operate to deprive an accused of his right to be informed of his basic constitutional guarantees and to make for himself the decision to waive his immunity from further prosecution. How can a Constitutional right be said to exist, much less be meaningful, if the accused, without knowledge of its existence or without understanding that the facts unfolding before him trigger its application, loses the benefit of it by his silence?

2. Following as it did upon a holding of waiver by silence of a basic Constitutional right (and jurisdictional requisite), the cursory consideration given by the Fifth Circuit to the merits of the petitioner's plea resulted in serious error. As early as 1824, this Court dealt with the effect of the declaration of a mistrial because of the jury's inability to agree, *United States v. Perez*, 9 Wheat. (22 U.S.) 578. Perez had been indicted for piracy and, after a short trial, the case was submitted to the jury. Some time later, they reported to the trial court that they were unable to agree and that there was no probability that further deliberation would lead to unanimity. As a consequence, the trial judge decided to discharge them. When Perez later claimed immunity from further prosecution on Constitutional grounds, Circuit Justice Van Ness, on the strength of the English practice, favored sustaining the plea, regardless of the circumstances under which

the mistrial had been declared. Mr. Justice Thompson, however, thought there was no merit in Perez's contention because in his view "the Court had power to discharge the jury in criminal cases . . . in the sound discretion of the court, under all the circumstances of the case." 37 Fed Cas. at 505.

The case came to the Supreme Court by certification because of this division of opinion among the Circuit Justices. The question was again whether there could be any circumstances in which a discharge of the jury would not work an acquittal. Mr. Justice Storey held that Federal courts could declare mistrials but that the power was a very limited one: only in the exercise of a "sound discretion . . . used with the greatest caution, under urgent circumstances, and for very plain and obvious causes," 9 Wheat. (22 U.S.) 578 (1824). And this Court recently reaffirmed this exacting standard in *Downum v. United States*, 372 U.S. 734, 735-6 (1963), holding that "the discretion to discharge the jury before it has reached a verdict is to be exercised 'only in very extraordinary and striking circumstances . . . .'"

Petitioner contends that, far from meeting the commands of *Perez* and *Downum* for a sound discretion in ordering a mistrial, the trial judge in the instant case exercised no discretion at all. The important facts are that petitioner's trial was long and complicated—three defendants, six counts, four trial days, twenty-three witnesses, over 100 exhibits. The jury deliberated only three and one-half hours and *never* indicated in any manner that they were having difficulty reaching agreement. On these totally neutral facts, Judge Elliott recalled the jury and instructed them that they could return a piecemeal verdict. The instruction appears as an attempt to ease the jury's deliberations on difficult matters by allowing

them to clear away the counts upon which they were agreed.[1] They immediately acquitted petitioner's employee. Immediately upon the announcement by the jury of their decision as to one of the defendants, the judge summarily discharged the jury, without permitting them to retire and deliberate on the remaining defendants.

A statement by the jury that they were deadlocked on the remaining defendants, or, lacking a spontaneous declaration, an inquiry by the trial judge concerning the status of their deliberations or even how they stood on their last ballot might have justified a mistrial. But the jury made no such declaration and Judge Elliott made no inquiry, as the meticulous record demonstrates. Instead he precipitously declared a mistrial as to petitioner and the other remaining defendant. Whether the trial court's action resulted from a misconception of his power or from an intimation that the jury, having acquitted the employee, were about to acquit the employer, the mistrial at that point was patently improper.

In contrast to these facts, this Court has never approved the declaration of a mistrial on the grounds that the jury could not agree unless at least two factors were present: (1) extreme length of jury deliberation, and (2) either a voluntary declaration by the jury that they were deadlocked or an inquiry of them by the trial judge producing a statement to that effect. For example, in *Logan v. United States*, 144 U.S. 263, 298 (1892), the jury were out "forty hours [and] . . . announced in open court they were unable to agree." Simi-

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[1] Judge Elliott frequently used this charge for such a purpose. Counsel's investigation of cases resulting in mistrials in his Divisions of the Middle District, see pp. 13-14, *infra*, disclosed its use in six out of fifteen of them. His practice was to allow the jury to return a verdict on some defendants on some counts and then to retire to deliberate further on remaining counts and defendants. See *United States v. DuPoint*, Thomasville Crim. No. 1170.

larly, in *Dreyer v. Illinois*, 187 U. S. 71 (1902), the jury were out seventeen and one-half hours and reported their inability to agree. *Id.*, 58 NE at 621. Again in *Keerl v. Montana*, 213 U.S. 135 (1908), "the jury were kept out at least twenty-four hours and probably more . . ." *Id.* at 138. And, even more importantly, as the record below showed:

> "The jury . . . returned into Court and *having been inquired of by the judge* . . . it satisfactorily appearing to the Court that the jury cannot agree [the] Court ordered the jury discharged . . . and the clerk . . . to enter of record that the Court found that there was a reasonable probability that the jury would not agree . . ." *Id.*, 85 Pac. at 863 (Emphasis added).

There being no spontaneous declaration from the jury, no inquiry of them by the judge, and no extreme length of deliberation from which an inference could have been drawn that the jury were deadlocked, the only other extant fact was the acquittal of petitioner's employee. If the employee had been convicted, the government might possibly argue that the mistrial was declared for petitioner's benefit and, as such, unexceptionable. *Gori v. United States*, 367 U.S. 364, 369 (1961). But if any inference is possible from the acquittal, it is that they would have acquitted him also.[2]

Thus, Judge Elliott's action is supported neither by judicial findings of fact duly placed upon the record nor by facts *de hors* the court's finding. No authority exists which

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[2] Kalven and Zeisel, *The American Jury*, Little, Brown & Co. (Boston, 1966), pp. 313-17. The authors' University of Chicago Jury Project research indicates that, because of a jury's desire to treat multiple defendants evenhandedly ("the preferential treatment theme"), once one defendant has been acquitted there is a strong likelihood the jury will acquit the remainder. And this tendency exists even when, in contrast to the instant case, the verdict on the second defendant does not depend upon the same facts and circumstances relevant to the first defendant who was acquitted.

justifies a trial judge's conclusions, albeit in good faith, which are supported neither by findings placed upon the record nor by facts *de hors* a finding.[3]

3. These questions of unjustified declarations of mistrials and the resulting possibility of the defendant's uninformed waiver of his Constitutional rights arise surprisingly frequently and, as a consequence, are of substantial importance in the administration of criminal justice. More than 5% of all jury trials end in a dismissal on the ground that the jury are unable to agree.[4] The reasons for this phenomenon are complex and beyond the present question, but the University of Chicago Jury Project has demonstrated that a major indicium of deadlock is the length of the jury's deliberation, particularly with regard to the length of the trial. Using the authors' classification (four trial hours equal one trial day), petitioner's first trial falls into the category of "over one week" in length. The Jury Project discovered that the average jury in this category required 7.3 *hours to reach agreement, and a full 10 hours to reach deadlock.* Looking at the statistics from another viewpoint, in 87% of the cases in this category the jury deliberated over 5 hours, and in 57%, over 10 hours.[5] The authors' conclusion is that "there is a certain [minimum] time limit which the judge will observe before he *accepts* the

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[3] *Gori v. United States*, 367 U.S. 364, 371, n. 3 (1961) (Douglas, J., dissenting).

[4] Kalven and Zeisel, p. 453, Appendix A, note 3 and tables 140, 142.

[5] As revealed in an examination of court records, in Judge Elliott's own experience, the average time (per trial day) which was required to reach deadlock, was 3.8 hours. By this determination, the jury in the instant case would have had to deliberate 19 hours. In addition, all but one of the cases upon which this computation is based were one day or less, and the Jury Project research indicates that deliberation time increases geometrially with the length of the trial.

jury as deadlocked."[6] The reason undoubtedly lies in the enormous cost of a jury trial extending over such a period of time. The public has a substantial interest in the prevention of mistrials declared after inadequate (or nonexistent) assurance that the jury is in fact hung.[7]

Even more important, from the individual defendant's point of view, a retrial means further

> "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-8 (1957).

The double jeopardy provision of the Constitution is concerned with the disparity of power and resources between the government and the accused, which disparity becomes increasingly more important if the defendant must undergo another trial.[8]

This ordeal of retrial is amply demonstrated by actual experience in the United States District Court for the Middle District of Georgia. Counsel for petitioner have extensively examined records of cases tried in that court in the Albany, Americus, Columbus and Thomasville divisions, which are

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[6] Kalven and Zeisel, p. 457. (Emphasis added.)

[7] For example, in *United States v. Mason*, Columbus Crim. No. 5228, defendant was accused of purloining less than $80 in building materials. It was only after two successive mistrials that the case against him was dismissed on motion of the District Attorney.

[8] The immense cost of premature termination of a first trial is amply demonstrated in the present case. In his first trial, petitioner expended $10,284.73; his second trial cost $11,254.67. Virtually any defendant's financial resources would have been exhausted after the first trial. This immense cost should weigh heavily in any consideration of circumstances in which a mistrial fairly may be declared.

assigned to Judge Elliott. In these Divisions during the period 1962 - 1967, at least fifteen criminal cases ended in mistrials on the ground that the jury could not agree. In these cases, four defendants were found guilty upon subsequent retrial.[9] In two other cases the defendants pled guilty after mistrials rather than submit to the ordeal and expense of a second trial.[10] In three cases retrial again resulted in hung juries, in two of these cases the indictment was then dismissed,[11] but in the third the defendant pled guilty after two mistrials.[12] A jury deadlock might ordinarily be said to offer some hope to a defendant, since it indicates, at the least, that some jurors have a reasonable doubt as to his guilt, but the experience in the Middle District of Georgia indicates that this hope is outweighed by the advantage to the prosecutor in having two, or potentially three, bites at the apple. While the double jeopardy clause may not prevent retrial after a trial in which error has been committed, it should stand as a guarantee to the defendant that, absent extraordinary circumstances, he will not again have to marshall his resources after the jury has received his case free from error. Petitioner does not urge upon this Court any extraordinary rule of law. He merely asks that this Court firmly delineate the circumstances in which the exercise of a sound discretion in declaring a mistrial is appropriate, and replace the anxiety, expense, hardship, and potential unfairness to which he and other defendants have been put, with, at the very least, a simple

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9/ *United States v. Hamsley*, Americus Crim. No. 1497; *United States v. Lucas*, Columbus Crim. No. 5052 (both defendants); *United States v. Ellis*, Albany Crim. No. 2179.

10/ *United States v. Anderson*, Albany Crim. No. 2222 (two defendants); *United States v. DuPoint*, Thomasville Crim. No. 1002 (defendant Neal).

11/ *United States v. Mason*, Columbus Crim. No. 5228; *United States v. Musselwhite*, Albany Crim. No. 3018.

12/ *United States v. Hightower*, Albany Crim. No. 2246.

requirement that before declaring a mistrial a trial judge should inquire of the jury as to the possibility of their reaching a verdict so as to have a basis upon which to exercise his discretion.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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